85-1814

SUPREME COURT, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,

Petitioner,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALEXANDRA de SAINT PHALLE
LONDRIGAN, POTTER & RANDLE, P.C.
1227 South Seventh Street
Post Office Box 399
Springfield, Illinois 62705
Telephone (217) 544-9823
Attorney for Petitioner.

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether an appellate court may deliberately depart from this Court's and other circuits' precedents on the issue of whether the citizenship of the administrator or beneficiaries controls in a wrongful death action?

(2) Does a circuit court's refusal to follow other circuits' views constitute a denial of equal protection of the law?

(3) Should this court exercise supervisory authority to lessen the incidence of intercircuit conflicts?

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CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 7th Circuit entered on December 16, 1985, to resolve the intercircuit conflict and conflict with this Court's decisions on the issue presented herein.

OPINION BELOW

The judgment at issue and dissenting opinions are reported at ___ F.2d ___ and are reproduced in the appendix hereto. An earlier opinion by the 7th Circuit was not published but is reproduced in the Appendix. The Trial Court's opinion was not published but is also reproduced in the Appendix hereto.

JURISDICTION

The decision of the panel of the 7th Circuit was issued on August 9, 1985. It was amended by the Court on December 16, 1985. A timely Petition for Rehearing *en banc* was denied on December 16, 1985 with Judges Posner, Easterbrook and Eschbach dissenting. This Court's jurisdiction is invoked pursuant to 28 U.S.C., §1254(1).

APPLICABLE STATUTES

The text of 28 U.S.C. §1359 and Illinois' Special Administrator statute applicable in wrongful death actions *Ill.Rev.Stat.* c. 70, § 2.1 is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

This is an action by Krista Wilsey, an Iowa resident, against three Illinois physicians for the wrongful death of her four (4) year old daughter, Lacey Hammel. At the time of filing suit, Lacey Hammel's father was an Illinois resident. Krista Wilsey was named by the federal district court to be a special administrator of the estate of her daughter pursuant to Illinois' Wrongful Death Act Special Administrator statute, *Ill.Rev.Stat.* c. 70, § 2.1.[1] No question of lack of diversity jurisdiction was raised in the trial court. (A-18). Instead, the three defendants filed motions to dismiss arguing that under §2.1 an Illinois resident had to be named as Special Administrator of the estate, and that a federal court had no authority to appoint a Special Administrator pursuant to §2.1. The trial court found that a federal court did have authority to appoint a Special Administrator but ruled that the special administrator had to be an Illinois resident and consequently dismissed the suit. (A-19)[2]

In the 7th Circuit, the panel issued an order on April 17, 1985, which did not rule on the trial court's appointment of an Iowa resident to be a Special Administrator under Illinois law and Rule 17 of the Federal Rules of Civil Procedure. (A-14) Instead, the 7th Circuit *sua sponte* noted a lack of diversity jurisdiction because it appeared that one of the three beneficiaries of Lacey Hammel's estate was an Illinois resident. The Court remanded the matter back to district court to determine the citizenship of Lacey Hammel's father, Jeff Hammel. (A-14).

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1. The text of *Ill.Rev.Stat.* c. 70, §2.1 is set forth in the appendix.

2. After the trial court dismissed this law suit and before the notice of appeal was filed, Lacey Hammel's father filed a wrongful death action in state court to guard against the possibility of not having any remedy for the wrongful death. If federal court jurisdiction is upheld, the state court suit will be dismissed.

On remand to the district court, Plaintiff's counsel acknowledged Jeff Hammel's Illinois citizenship and contemporaneously filed a motion for reconsideration with the 7th Circuit panel. That motion urged the traditional rule, followed by this Court and every other circuit, that the citizenship of the administrator controls diversity rather than that of the beneficiaries. The motion also argued that it was unfair to decide a question of jurisdiction *sua sponte* without benefit of any briefing by the parties. The panel then ordered the Defendants to file a response. On August 9, 1985, the 7th Circuit issued a final order adhering to but amplifying upon its earlier expressed views that the citizenship of the beneficiaries controls diversity rather than that of the administrator. (A-8).

Plaintiff then filed a petition for rehearing and rehearing *en banc*. On December 16, 1985 that petition was denied with Judges Posner, Eschbach and Easterbrook dissenting. In his dissent, Judge Posner notes that the position taken by the 7th Circuit in this case is contrary to this Court's decision in *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980) and to the position followed by "most, perhaps all, other courts of appeals". He and Judges Eschbach and Easterbrook would have granted rehearing *en banc* to resolve the conflict with the other circuits and with this Court. (A-3, 7)

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

Granting a writ is warranted to resolve the intercircuit conflict between the 2nd, 3rd, 5th, 6th, 8th and 10th Circuits on the one hand and the 4th and 7th Circuits on the other hand. Review is likewise warranted to resolve the 7th Circuit's departure from this Court's previous decisions on the continually recurring question of whose citizenship should control in diversity actions brought by a personal representative.

Granting of a writ is further warranted to urge greater intercircuit deference to minimize disharmony in the application of federal substantive law and to rule on the constitutional dilemma posed by unequal application of federal law by the federal circuits.

I. Resolution of the Intercircuit Conflict is Required to Ensure U niform Application of Federal Law in Diversity Actions.

As set forth in Judge Posner's, Easterbrook's and Eschbach's dissenting opinion, there is a clear conflict amongst the circuits and with this Court on the issue of whether an administrator's or the beneficiaries' citizenship should control diversity in wrongful death actions. (A-4) Currently, the division of authority on this issue aligns this Court along with the views of the 2nd, 3rd, 5th, 6th, 8th and 10th Circuits on one side of the controversy and the views of the 7th Circuit and to a slightly lesser extent the 4th Circuit on the opposite side.[3]

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3. The most recent opinions of 2nd, 3rd, 5th, 6th, 8th and 10th circuits on the issue are *Bettin v. Nelson*, 744 F.2d 53 (8th Cir. 1984); *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d 458 (5th Cir. 1984); *Gross v. Hougland*, 712 F.2d 1034 (6th Cir. 1983) *cert. den.* 465 U.S. 1025 (1980); *Hackney v. Newman Memorial Hospital*, 621 F.2d 1069, 67 ALRF 456 (10th Cir. 1980) *cert. den.* 449 U.S. 982 (1980); *Field v. Volkswagen, A.G.*, 626 F.2d 293 (3rd Cir. 1980); *Groh v. Brooks*, 421 F.2d 589 (3rd Cir. 1970); *O'Brien v. Avco.*, 425 F.2d 1030 (2nd Cir. 1969).

The 10th Circuit's views expressed in *Hackney* are slightly different from the foregoing opinions. In *Hackney* the 19th Circuit held that even if there was a purpose to manufacture diversity jurisdiction the administrator's citizenship will govern diversity as long as the administrator chosen has a beneficial interest in the proceeds.

The 7th Circuit opinions are this case and its earlier decision in *Betar v. DeHavilland Aircraft of Canada*, 603 F.2d 30 (7th Cir. 1979).

The 4th District's numerous views on the subject appear in *Krier-Hawthorne v. Beam*, 728 F.2d 658 (1984); *Messer v. American Gens, Inc.*, 612 F.2d 1367 (4th Cir. 1980), *cert. denied*, 446 U.S. 956, (4th Cir. 1980); *Sadler v. New Hanover Memorial Hospital, Inc.*, 588 F.2d 914 (4th Cir. 1978); *Mullins v. Seals*, 562 F.2d 326 (4th Cir. 1977); *Vaughan v. Southern Railway Company*, 542 F.2d 289 (4th Cir. 1976); *Bishop v. Hendricks*, 495 F.2d 289 (4th Cir. 1974), *cert. denied*, 419 U.S. 1056 (1974); *Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972); *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969).

This Court has always declared that an administrator's citizenship should control diversity rather than the beneficiaries' citizenship in an action brought on behalf of an estate. *Chappedelaine v. Dechenaur*, 4 Cranch 306, 2 L.Ed. 629 (1808); *Childress v. Emory*, 8 Wheat 642, 5 L.Ed. 705 (1823).

In *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931) this Court clearly reiterated this view.

> "It is settled that the federal courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship. *Childress v. Emory*, 8 Wheat. 632, 5 L. ed. 705 . . .
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> * * *
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> The petitioner insists that where an administrator is required to bring the suit under a statute giving a right to recover for death by wrongful act, and is, as here, charged with the responsibility for the conduct or settlement of such suit and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, he is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction. This we think is the correct view. The applicable statutes make the administrator the trustee of an express trust and require the suit to be brought and controlled by him." *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 52 S.Ct. 84, 76 L.Ed. 233, 237 (1931).

This same view was reiterated again by this Court in the context of a business trust six years ago in *Navarro Savings Assn. v. Lawrence F. Lee*, 446 U.S. 458 (1980).

> ". . . a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others.
>
> * * *

> They have legal title; they manage the assets; they control the litigation. In short, they are real parties to the controversy. For more than 150 years, the law has permitted trustees who meet this standard to sue in their own right . . ." *Navarro Savings Assn. v. Lee*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425, 431, 432 (1980).

Notwithstanding these clear pronouncements of this Court, the 7th Circuit in this case and in its earlier decision of *Betar v. DeHavilland Aircraft of Canada*, 603 F.2d 30 (7th Cir. 1979) has taken a deliberately contrary position. The 7th Circuit holds that the citizenship of all the beneficiaries controls diversity rather than that of the administrator, even if there was no motive to manufacture diversity.

> "We are fully aware that the Tenth Circuit has disagreed with the *Betar* analysis, finding that a personal representative, whose duties are to bring the wrongful death action, conduct the litigation, and distribute the proceeds, is not merely a nominal party. *Hackney v. Newman Memorial Hospital, Inc.*, 621 F.2d 1069, 1071 (10th Cir. 1980). We are, however, bound by this circuit's precedent unless that precedent is later determined to be erroneous.
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> * * *
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> Where the personal representative's role under state law is that of a nominal party, the citizenship of the beneficiaries controls. Merely because one of the beneficiaries seeks appointment as the personal representative does not dispense with consideration of the citizenship of the other beneficiaries. Complete diversity between the beneficiaries and the defendants is required." *Wilsey v. Eddingfield*, (A-10-11, 12-13)

The 4th Circuit's position is also contrary to this Court's decisions in *Mecom* and *Navarro* in that it holds that unless an administrator holds a substantial beneficial interest in the outcome of the case the citizenship of the beneficiaries will control diversity even if there was no motive to manufacture jurisdiction. *Miller v. Perry*, 456 N.E.2d 63 (4th Cir. 1972); *Bishop v. Hendricks*, 495 F.2d 289 (4th Cir. 1974), *cert. den.* 419 U.S. 1056

(1974). But compare *Krier-Hawthorne v. Beam*, 728 F.2d 658 (4th Cir. 1984) which rejects the *Miller* and *Bishop* views if the administrator is named as a defendant.

The 4th Circuit's position rejecting consideration of the citizenship of the administrator in cases where there was no motive to manufacture diversity jurisdiction has been explicitly rejected recently by the 5th and 6th Circuits in *Bianca v. Parke-Davis Pharmaceutical Div.*, 723 F.2d 392, 398 (5th Cir. 1984) and in *Gross v. Hougland*, 712 F.2d 1034, 1039 n. 10 (6th Cir. 1983) *cert. den.* 465 U.S. 1025 (1984) and implicitly rejected in *Bettin v. Nelson*, 744 F.2d 53 (8th Cir. 1984). All of these courts have held that the administrator's citizenship should control diversity unless there was an explicit purpose to manufacture diversity. But, unlike the 5th, 6th and 8th Circuits, the 10th Circuit holds that a motive to manufacture diversity jurisdiction is irrelevant to the administrator's citizenship controlling diversity if the administrator has a beneficial interest in the outcome of the case. *Hackney v. Newman Memorial Hospital*, 621 F.2d 1069, (10th Cir. 1980) 67 ALRF 456, *cert. den.* 449 U.S. 982.

The genesis of all of these divergent opinions is this Court's opinion in *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969). There in a footnote, this Court raised but did not resolve the question whether an administrator's citizenship would control diversity where there was a purpose to manufacture diversity.

> "Nor is it necessary to consider whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative 'improper' or 'collusive.' See, e.g., *McSparran v. Weist*, 402 F.2d 867 (1968); *Lang v. Elm City Constr. Co.*, 324 F.2d 235 (1963); *County of Todd v. Loegering*, 297 F.2d 470 (1961); cf. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 52 S.Ct. 84, 76 L.Ed. 233, 77 ALR 904 (1931). Cases involving representatives vary in several respects from

> those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties. It is not necessary to decide whether these distinctions amount to a difference for purposes of § 1359." *Kramer v. Caribbean Mills*, 394 U.S. 823, 89 S.Ct. 1487, 23 L.Ed.2d 9, 14, n. 9 (1969)

But *nowhere* in *Kramer* did this Court ever suggest that an appellate court could dispense with the traditional rule that an administrator's citizenship controls diversity in the absence of collusion. Here the child's mother was appointed as administrator and there is obviously no question of a collusive appointment.

In *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980) this Court reiterated the rule that the administrator's citizenship controls diversity with regard to trustees who possess certain "customary powers to hold, manage and dispose of assets for the benefit of others" in the case of business trusts. Under Illinois law, as under most wrongful death or probate statutes, the personal administrator has those same explicit powers of holding legal title, managing assets, and controlling the litigation referred to in *Navarro* at 446 U.S. 465 (1980). See Judge Posner's dissent from rehearing *en banc* at (A-3) and *Rogers v. Consolidated Railroad Corp.*, 136 Ill.App.3d 191, 482 N.E.2d 1080 (4th Dist. 1985).

Notwithstanding this Court's recent decision in *Navarro*, the 7th Circuit's decision here has chosen to ignore it and announce a contrary rule that beneficiaries' citizenship will be controlling in diversity cases regardless of the circumstances. This deliberate departure from both this Court's recent *Navarro* opinion and its earlier precedent in *Mecom* poses a serious threat to this Court's authority and legitimacy.

Supreme Court review is mandated to resolve this conflict with this Court's own decisions as set forth in Supreme Court Rule 17(c) as well as to resolve the conflict with the decisions from the 2nd, 3rd, 5th, 8th and 10th Circuits.[4] Unless the divergent views taken by the 7th Circuit and the 4th Circuit are resolved by the Supreme Court, the bench and bar will continue to struggle over what this Court has noted should be "a matter of relative simplicity" and "as self-regulated as breathing". *Navarro* at 446 U.S. 464, n. 13. Obviously the question of whether the administrator's or beneficiaries' citizenship controls diversity will continue to recur in every wrongful death diversity case filed in the federal courts. The extent of the conflict is demonstrated by more than a dozen Court of Appeals decisions on the same issue in the last ten years.[5] This mountain of litigation will be exacerbated by the 7th Circuit's decision here because it is the first decision ever to hold that the beneficiaries' citizenship is controlling regardless of the circumstances. Now every court of appeals and district court in the nation will be faced by arguments to change existing law on diversity jurisdiction based on the 7th Circuit's precedent in this case. It will lead to protracted delays in diversity suits; it will lead to unseemly opportunities for forum shopping amongst the circuits and it will pose difficult dilemmas for federal judges in trying to ascertain which of the obviously conflicting precedents is controlling.

Even if the 7th Circuit's holding were not in conflict with this Court and all of the other circuits, Supreme Court review would be warranted because the 7th Circuit's holding that the beneficiaries' citizenship controls diversity will create chaos throughout the federal courts. Not only does each state differ in who might be defined as beneficiaries under their respective

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4. See note 3 *supra* at p. 5 of this brief for a complete list of the most recent conflicting decisions from each of these circuits.

5. See note 3 *supra* at p. 5 of this brief.

wrongful death acts, but also in many states, such as Illinois, there must be an evidentiary determination as to whether a collateral or lineal next of kin might qualify as a beneficiary depending upon his degree of "dependency" upon the decedent. See eg. *Ill.Rev.Stat.* ch. 70, §2. *Matter of Estate of Griffy*, 64 Ill.App.3d 504, 381 N.E.2d 755 (5th Dist. 1978) In cases involving trusts and trustees, beneficiaries might be equally difficult to ascertain. Other beneficiaries might be unknown or lost. Surely the federal courts should not be required to engage in this type of detailed evidentiary inquiry to determine who are the qualified beneficiaries merely to ascertain whether a federal or state court has jurisdiction to hear the case. See Posner's dissent at A-6. In *Navarro*, this Court noted that there should be a simple rule for determining citizenship in the diversity cases. To compel the federal courts to engage in this type of detailed evidentiary inquiry might push to the breaking point the already overburdened federal courts.

II. A Writ Should be Granted to Urge Greater Deference Between the Circuits and Thereby Lessen this Court's Workload.

As noted in the dissent of Judges Posner, Eschbach and Easterbrook, the decision reached by the 7th circuit here is in conflict with that reached by every other circuit considering the issue. What justification is there for this conflict? Is there anything peculiar about the 7th Circuit that requires a different rule in diversity cases than that which prevails elsewhere? Surely not. The 7th Circuit's recalcitrant views can only lead to injustice to 7th Circuit Court litigants and chaos and proliferation of litigation throughout the nation.

Several commentators have noted that this Court could eliminate or minimize intercircuit conflicts by promulgating a rule or decision to minimize those conflicts.

> "What is serious is the case of the deliberate consideration and rejection of the opinion — even the en banc opinion

> —of one court of appeals by another. Those deliberate conflicts can be eliminated or reduced to manageable proportions without the necessity for more courts.
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> ° ° °
>
> By rule and decision the Supreme Court could require procedures that would sharply reduce the conflicts and increase the uniformity of national law. A Supreme Court rule could provide that the first panel decision of a court of appeals would establish the proposition for all of the courts of appeals, just as it now does for all subsequent three-judge panels within the circuit and for all of the district courts within the circuit. That decision would remain controlling until it is overruled en banc by a court of appeals, either that or another circuit. That en banc decision would control until overruled by the Supreme Court." Schaefer, Walter V. "Reducing Circuit Conflicts" 69 *ABA Journal*, 455 (1983)

See also William T. Coleman, "The Supreme Court of the United States: Managing its Caseload to Achieve its Constitutional Purposes" in 52 *Fordham L.Rev.* 1, 18-19 (1983). Philip B. Kurland & Dennis J. Hutchison, "The Business of the Supreme Court, O.T. 1982." 50 *Univ. of Chicago L.Rev.* 628, 638-9 (1983).

Certain circuits have recognized the need for harmony amongst the circuits to prevent needless burden on this Court.

> "Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless our 11 courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework or our national court system. See dissenting opinion of White, J., in *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014, 99 S.Ct. 626,

> 58 L.Ed.2d 687 (1978), and the opinion of Burger, J., appended thereto." *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979)

However, the 7th Circuit here, and other circuits have taken a decidedly different view.

> ". . . 'a sister circuit's reasoned decision deserves great weight and precedential value.' *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979). A reasoned decision of our own circuit, however, is just as deserving of deference. *Waterway* is such a decision, and we decline to overrule it today out of deference to our colleagues on other circuits." *Foley-Wismer v. N.L.R.B.*, 682 F.2d 770 (9th Cir. 1982)

Using this case as a vehicle to instruct the circuit courts of appeal to make efforts to reduce intercircuit conflicts by *en banc* decisions or otherwise could measurably increase the uniformity and harmony in the way federal law is interpreted throughout the United States and at the same time diminish a substantial portion of this Court's docket.[6] See Coleman *supra* at 52 *Fordham L.Rev.* 18 quoting Justice O'Connor's estimate that 23.7% of the Supreme Court's decided cases during her first term, involved conflicting lower court decisions, and Schaefer *supra* at p. 455.

The only possible criticism of this point of view could be appellate judges who might disagree with their sister courts. However, if the Court of Appeals judges disagree with the findings of their sister circuits they would always be free to state those opinions in dissenting opinions and thereby perhaps attracting Supreme Court review. But at the same time these dissenting views would not fragment the national law and lead

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6. Apparently at least two members of this Court have urged this result. See views of Justices White and Brennan cited in Coleman, 52 *Fordham L.Rev.* 18 (1983) and William J. Brennan "Some Thoughts on the Supreme Court's Workload", 66 *Judicature* 232 (1983).

to repeated litigation over what rule should prevail. See Schaefer *supra* at 455.

III. The 7th Circuit's Refusal to Follow the Decisions of Other Circuits Creates an Unconstitutional Deprivation of Equal Protection Law to all Litigants in the 7th Circuit.

Except in the states of Illinois, Indiana and Wisconsin, it is clear that an administrator is free to have her citizenship control diversity so long as she has a beneficial (4th and 10th Circuits) or noncollusive interest (2nd, 3rd, 5th, 6th and 8th Circuits) in the controversy. However, here the 7th Circuit has emphatically held that 7th Circuit Court litigants do not have this same right as exists in the other circuits. This is surely an unconstitutional discrimination by the Court system based solely on residence.

> "A court can violate equal protection and other constitutional rights by its opinions, just as a legislative body can violate constitutional rights by its statutes. When a court deliberately refuses to follow the earlier ruling of a court of coordinate authority, it creates an unconstitutional discrimination. What is involved in the 'law of the circuit' is akin to what was involved in *Erie v. Tompkins*. In that case a rule, promulgated by judges, was held unconstitutional because it subjected citizens to different rules of law depending solely upon the court in which the action was brought. The 'law of the circuit' operates in the same way: it subjects the citizens to different rules of law depending solely upon the court in which the action is brought." Schaefer, Walter V. "Foreword: Stare Decisis and the 'Law of the Circuit'", 28 *DePaul L.Rev.*, 565, 568

Just as *Erie v. Tompkins Railroad Co.*, 304 U.S. 64 (1932) condemned discrimination in the application of state law between state and federal courts, so should discrimination in the application of substantive federal law amongst the circuits be condemned here. It is quite clear that in enacting provisions for separate circuit courts of appeals in 1891, that Congress never intended those appellate courts to be bodies sovereign unto

themselves. Certainly Congress did not intend that one set of federal rules should be applicable in one part of the country and another set applicable elsewhere. Just as Congress could not enact special legislation which only applied to several selected states, the federal judiciary should not be able to make rules of general substantive applicability which are applicable only in selective states. Supreme Court review is warranted to remedy this unconstitutional discrimination by the federal judiciary.

CONCLUSION

The foregoing discussion and Judge Posner's, Eschbach's and Easterbrook's dissent indicate the existence of a clear conflict between this Court's decisions and the 7th Circuit's opinion in this case, as well as with the other circuits. Given the often recurring nature of the issue raised in this Petition, it is imperative that it be reviewed here to avoid further proliferation of the views of the circuits and denial of 7th Circuit litigants' constitutional rights to a uniform application of federal law.

The Petitioner therefore respectfully prays that a Writ of Certiorari be granted to review the decision of the 7th Circuit.

Respectfully submitted,

ALEXANDRA de SAINT PHALLE
LONDRIGAN, POTTER & RANDLE, P.C.
1227 South Seventh Street
Post Office Box 399
Springfield, Illinois 62705
Telephone (217) 544-9823
Attorney for Petitioner.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Walter J. Cummings, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge*
Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge**

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,
Plaintiff-Appellant, Cross-Appellee,

Nos. 84-2178, 84-2237, 84-2258

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 84 C 1057
Michael M. Mihm, *Judge.*

Decided December 16, 1985

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*The Honorable Jesse E. Eschbach since participating in consideraton of this case has taken senior status.

**The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation. Judge Brown did not participate in the vote on the petition for rehearing *in banc*.

ORDER

On consideration of the petition for rehearing and suggestion *in banc* filed in the avove-entitled cause by plaintiff-appellant, Krista Wilsey, individually and as Special Administrator of the Estate of Lacey M. Hammel, Deceased Minor, a vote of the active members of the court was requested, and a majority of the active members of the court have voted to deny rehearing *in banc*.[1] The order entered in this case on August 9, 1985, is amended sua sponte by the original panel by the addition of a new footnote number 1, and the renumbering of the original footnotes. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing and petition for rehearing in banc be, and the same are hereby Denied.

1. Judges Eschbach, Posner, and Easterbrook voted to grant rehearing *in banc*, and Judges Eschbach and Easterbrook join in Judge Posner's dissent to the Order of this court denying rehearing *in banc* which follows this Order.

POSNER, *Circuit Judge*, whom ESCHBACH and EASTERBROOK, *Circuit Judges*, join, dissenting. I would grant rehearing en banc to resolve the conflict between our circuit and the other circuits over whether the citizenship of a personal representative is controlling for purposes of determining whether there is diversity of citizenship. Although a majority of my colleagues have decided not to rehear the case I hope that the next panel of this court to be seised of this issue will give serious consideration to overruling *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30 (7th Cir. 1979), on which the decision in the present case is based, in light of decisions subsequent to *Betar*.

Ordinarily the citizenship of the fiduciary who brings (or defends) a suit, rather than the citizenship of his beneficiaries, determines whether the suit can be brought in federal court under the diversity jurisdiction. This rule, derived from a line of Supreme Court decisions stretching back to 1808, was emphatically reaffirmed in *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980), decided after *Betar*. The Court in *Navarro* said: "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." *Id.* at 464 (footnote omitted). Under Illinois law a suit on behalf of a decedent's estate is prosecuted by and in the name of a personal representative, or if the sole asset of the estate is a claim for damages for the wrongful death of the decedent, by a special administrator. See Ill. Rev. Stat. ch. 70, pars. 2, 2.1. These are fiduciaries of the estate's beneficiaries and have sole control over the litigation. A case decided since *Betar*, indeed since the panel's decision in the present case, dispels an earlier question as to whether Illinois law contained peculiarities that might enable its personal representatives and special administrators to be differentiated from their counterparts in other states for any purpose relevant to this case. See *Rodgers v. Consolidated Railroad Corp.*, 136 Ill. App. 3d 191, 193, 482 N.E.2d 1080, 1082 (1985), and compare *Hackney v. Newman Memorial Hospital, Inc.*, 621 F.2d 1069, 1071 (10th Cir. 1980).

There is of course a danger that the lawyers advising the estate or the beneficiaries might procure the appointment of an out-of-state administrator in order to be able to invoke diversity jurisdiction. If they do this they violate 28 U.S.C. § 1359, which forbids the manufacture of diversity jurisdiction. The presumption that the personal representative's citizenship controls for diversity purposes can therefore be rebutted by showing that he was appointed to enable the suit to be brought in (or removed to) federal court. Cf. *Navarro Savings Ass'n v. Lee*, *supra*, 446 U.S. at 465.

The approach I have sketched is the one that most, perhaps all, other courts of appeals follow. See, e.g., *Bettin v. Nelson*, 774 F.2d 53, 55-56 (8th Cir. 1984); *Bianca v. Parke-Davis Pharmaceutical Division*, 723 F.2d 392 (5th Cir. 1984); *Gross v. Hougland*, 712 F.2d 1034, 1037-39 (6th Cir. 1983). (The situation in the Fourth Circuit is unclear. Compare the majority and dissenting opinions in *Krier-Hawthorne v. Beam*, 728 F.2d 658 (4th Cir. 1984).) They and we have no choice, after *Navarro*. Granted, a trustee is a multi-purpose fiduciary, whereas a personal representative or special administrator is appointed precisely to represent the estate in litigation. Therefore the danger that the personal representative or special administrator will be picked with an eye to conferring diversity jurisdiction is greater than will usually be the case with a trust. The trustee will have been appointed well in advance of litigation, and the selection of the trustee will therefore be based on factors other than, or at least in addition to, obtaining an advantage in litigation. So courts must be especially alert for violations of section 1359 in cases like this; the presumption that a fiduciary is the real party for diversity purposes is easier to rebut; but the approach taken in *Navarro* is unshaken.

In *Betar*, decided as I have said before *Navarro*, we had held that since a personal representative lacks a personal stake in the litigation (for he is just the representative of the estate, i.e., of the testator's or intestate's beneficiaries), his citizenship is ir-

relevant; it is the citizenship of the beneficiaries that counts. See 603 F.2d at 35-36. It is irrelevant on this view that the appointment of the personal representative was not motivated by any purpose of conferring diversity jurisdiction.

The problem with this reasoning is that it applies with equal force to other beneficiaries, to trustees for example — who unless they are dishonest trustees have no personal stake in the assets of the trust — and is thus inconsistent with *Navarro*, which involved a trustee. *Betar* creates an arbitrary distinction between personal representatives and other trustees. Federal jurisdiction is a complicated enough field without attempting fine distinctions among types of fiduciary; at least that was the view of eight Justices in *Navarro*, who refused to distinguish between a Massachusetts business trust and an ordinary trust even though as Justice Blackmun pointed out in dissent there were significant differences between these entities. He called the majority's opinion "simplistic" and "formalistic," 446 U.S. at 475-76 (dissenting opinion); but of course it binds us.

Although the approach of *Betar* can perhaps be defended as an original matter by reference to the desirability of curtailing diversity jurisdiction and avoiding inquiries into the motive in appointing a personal representative (which perhaps shows that the quest for a simple and mechanically ascertainable test for jurisdiction is delusive in this area), and by observing that the purposes of the diversity jurisdiction are hardly served by, as in this case, allowing a federal court to determine the rights of one state resident against another, just because the trustee or representative of one of them is a nonresident, similar arguments were available, were made, and were rejected in *Navarro*. While a trustee is less likely than a personal representative to be appointed with an eye to getting an advantage in litigation, it is always possible that trustees would be switched on the eve of litigation to gain an advantage, and hence in trust cases too it will be necessary to inquire into motives in order to determine whether section 1359 has been violated. And al-

though normally a trustee has more extensive managerial duties than a personal representative or a special administrator, when and if the suit ends favorably to the plaintiff the personal representative or special administrator will have the same duties of conservation and distribution of assets that the executor or administrator of an ordinary estate has, or the trustee of a short-term trust or a trust that is winding up. In Illinois the special administrator has such duties and the personal representative doesn't, but in both this case and *Betar* the plaintiff is a special administrator, because the only asset of the estate is a wrongful death claim. The opinion in *Betar* called the special administrator a personal representative, but apparently was using the latter term loosely.

And against the approach taken in this case and in *Betar* it can be pointed out that often (though not here) it may be difficult to ascertain the citizenship of the beneficiaries, who may be numerous and in some cases unidentified. Because of the last point I am far from clear that the approach of *Betar* is correct as an original matter, for it is important that the existence or not of jurisdiction be easily determinable without exploring state inheritance law, or the decedent's family tree. But in any event *Betar* is out of step with the approach of the other circuits and, more important, seems impossible to reconcile with a recent decision by the Supreme Court. The fact that *Betar* was decided before *Navarro* is all the more reason for using this case to reexamine *Betar* in light of *Navarro*.

In this case, the named plaintiff, who seeks appointment as special administrator, is the decedent's mother and one of her three heirs; so it is not as if the lawyers had picked some unrelated nonresident, with the exclusive or primary purpose of conferring federal jurisdiction; no finding of a violation of section 1359 has been made. There are two possible problems with appointing her as special administrator, but neither provides the ground for the panel's decision, and only the second could actually support it. The first is that the plaintiff has not

been appointed by an Illinois court. Although a special administrator is ordinarily appointed by the court in which the action is sought to be filed, which in this case is the federal district court, and although federal district courts are empowered by Fed. R. Civ. P. 17(c) to appoint guardians *ad litem* for children or other legally incompetent persons in litigation before the court, the historic reluctance of the federal courts to entangle themselves in probate matters, on which see, e.g., *Dragan v. Miller*, 679 F.2d 712 (7th Cir. 1982), counsels against the appointment and consequent supervision of an estate's representative. Whether this argument should prove decisive I am not prepared to say. See *id.* at 714-16 for a general discussion of the considerations bearing on the application of the probate exception in diversity cases. But in any event, whereas the panel's decision will bar the plaintiff from ever litigating her claim in federal court, a decision holding that the court cannot appoint her the special administrator, while it would require dismissal of her suit, see *Pringle v. United States*, 419 F. Supp. 289, 291 (D.S.C. 1976), would let her repair to the Illinois courts for an appointment; and if she received it she could, but for the panel's decision, refile this suit.

The second problem is that it is unclear whether Illinois law authorizes the appointment of a nonresident special administrator for an Illinois estate (the decedent was an Illinois resident, living with her father, who has brought his own suit in an Illinois court). But the panel decision has not resolved that question either, and the answer is not obvious. So although there may be obstacles to maintaining this suit in federal court, the only obstacle the panel found is *Betar*, which we should reexamine if we are not to persist in a conflict with the other circuits and, more important, with the Supreme Court.

NOTE

The following Order was not previously published pursuant to Circuit Rule 35, but at Judge Posner's request the Order originally issued on August 9, 1985, as hereby amended, is attached hereto for publication.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge*

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,[1]
Plaintiff-Appellant, Cross-Appellee,

Nos. 84-2178, 84-2237, 84-2258

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 84 C 1057
Michael M. Mihm, *Judge.*

Decided August 9, 1985

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*The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

1. Although plaintiff-appellant, a resident of Iowa, sues in her individual capacity, she designates herself as "Special Administrator" and purports also to sue in that capacity. In her complaint she sought to have the district court exercise its diversity jurisdiction and appoint her special administrator under the Illinois statute. The district court determined that plaintiff-appellant as a

ORDER

On consideration of the motion for reconsideration filed in the above-entitled cause by plaintiff-appellant, cross-appellee Krista Wilsey, all of the judges on the original panel have voted to deny reconsideration. Accordingly,

IT IS ORDERED that the aforesaid motion for reconsideration be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that this case be REMANDED to the district court with directions to dismiss the complaint for lack of subject matter jurisdiction.[2]

Having had the full benefit of counsel's views on the jurisdictional issue presented and the district court's determination that decedent's father, like the defendants, is an Illinois citizen, we now hold that jurisdiction is lacking.

In *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 32 (7th Cir. 1979), we stated the general rule that "the citizenship of the real party in interest is determinative in deciding whether the district court has diversity jurisdiction." A party who has no significant interest in the outcome of the litigation cannot use his citizenship to transform a local controversy into one within the diversity jurisdiction of a federal court. Thus, although one serving in a representative capacity is a real party in interest in the sense that the action is properly

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non-resident could not qualify as special administrator under Illinois law and accordingly dismissed the complaint for lack of jurisdiction. The father of the deceased child, an Illinois resident, has a suit pending in state court alleging the same cause of action.

2. In an order dated April 17, 1985, we remanded this case *sua sponte* to the district court for a determination whether there was complete diversity between the parties, but retained jurisdiction of the appeal. Plaintiff-appellant Wilsey filed a motion for reconsideration and in the alternative a petition for rehearing with suggestion for rehearing *en banc*, challenging the April 17, 1985 decision and order. Because no final order had yet been issued in this case, only the motion for reconsideration is properly before us.

maintained in his name. Fed. R. Civ. P. 17(a), a representative is not necessarily the real party in interest for the purpose of determining diversity jurisdiction. *Id.* "[I]f the law of the state gives the administrator, guardian, or other representative the status of only a nominal fiduciary then the beneficiary or the ward, not the administrator or guardian, is the real party in interest, and it is the citizenship of the beneficiary or ward, as the case may be, that is determinative." 3A MOORE'S FEDERAL PRACTICE par. 17.04 (2d ed. 1985). That the touchstone of the test is a review of the representative's legal powers, rights and duties was reaffirmed in *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980). *See also Miller v. Perry*, 456 F.2d 63, 65 (4th Cir. 1972).

In *Betar*, we analyzed the duties of a personal representative under the Illinois Wrongful Death Act, Ill. Rev. Stat. ch. 70, § 1 *et seq.*, and determined that those duties were an inadequate basis for finding the personal representative to be the real party in interest for diversity purposes.

> The Illinois Wrongful Death Act gives neither the personal representative nor the decedent's estate the right to share in the proceeds of the recovery. The representative's sole duty under the Act is to distribute the proceeds to the statutory beneficiaries in the event of recovery.

Betar, 603 F.2d at 35.[3] We therefore concluded that the personal representative lacked a "stake in the outcome" and that the statutory beneficiaries were the real parties in interest; "[t]hey are the only parties that have an actual stake in the outcome of the litigation." *Id.* We are fully aware that the Tenth

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3. There is disagreement in Illinois cases on the extent of a personal representative's role in a wrongful death action. *Compare Franciscy v. Jordan*, 43 Ill. App. 2d 344 (2d Dist. 1963) (surviving spouse, as administrator of decedent's estate, legally possessed sole right of action or control over litigation) *with Strong v. Hodges*, 344 Ill. App. 306 (2d Dist. 1951) (administrator, who is only the legal agent of the beneficiary, does not have sole and exclusive right to control suit or to compromise, settle or release cause of action).

Circuit has disagreed with the *Betar* analysis, finding that a personal representative, whose duties are to bring the wrongful death action, conduct the litigation, and distribute the proceeds, is not merely a nominal party. *Hackney v. Newman Memorial Hospital, Inc.*, 621 F.2d 1069, 1071 (10th Cir. 1980). We are, however, bound by this circuit's precedent unless that precedent is later determined to be erroneous. This is not such a case.

Wilsey nevertheless contends that *Betar* does not govern the outcome of the present suit. She reads *Betar* to hold that the beneficiaries are the real parties in interest *only* when the personal administrator lacks a personal stake in the outcome of the lawsuit. She would have us concentrate on her status as a beneficiary in conjunction with her nominal status as personal representative. She informs us that if we do not do so, we will be creating conflict with seven other circuit courts of appeals.[4] Initially, we note that *Betar's* reference to a stake in the outcome, read in context, was inextricably intertwined with its previous discussion of the duties of a personal representative under the Illinois Wrongful Death Act. The court held that the beneficiaries were the real parties in interest because the representative is only a nominal party. *Betar* neither holds nor suggests, that the citizenship of a personal representative, who under state law has only nominal duties but who by virtue of her status as a beneficiary has a stake in the outcome, is controlling for diversity purposes. This is the issue presented here.

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4. In the cases referred to by Wilsey, with the exception of two addressed later, the appointment of nonresident representatives with only nominal duties had the effect of creating facial diversity of citizenship that would not otherwise have existed, all defendants and all beneficiaries being citizens of the same state. Because each of these representatives lacked a stake in the outcome (*i.e.*, his status under state law was as a nominal party only), the appointments were viewed as violations of 28 U.S.C. § 1359. In dicta, these courts stated that if the representatives had had stakes in the outcomes, their citizenship may have controlled for diversity purposes.

Hackney is cited by Wilsey in support of her argument. In *Hackney*, the decedent, the defendants, and all beneficiaries but one were Oklahoma citizens. The daughter-beneficiary who was an Oklahoma citizen originally was appointed administrator of decedent's estate. When the estate had been fully administered and only the cause of action for wrongful death remained, the administrator resigned and the daughter-beneficiary who was a Colorado citizen was named as her successor. The latter then filed suit in federal court claiming diversity of citizenship between herself and the defendants. The Tenth Circuit found that diversity jurisdiction had been properly invoked because the administrator had a "substantial relationship" to the litigation. Two considerations led the court to this conclusion. As previously noted, the court apparently disagreed with *Betar*, *O'Brien v. AVCO Corp.*, 425 F.2d 1030 (2d Cir. 1969), and *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969), that a personal representative appointed for the sole purpose of pursuing a wrongful death action is merely a nominal party. Under Oklahoma law, the administrator, to whom the cause of action belongs, has full authority to conduct the litigation; the beneficiaries have no right to settle, control or otherwise dispose of the action. The *Hackney* court further found that the administrator, by virtue of her status as a beneficiary under the Oklahoma wrongful death act, had a substantive stake in the litigation. The court's bottom line was that the appointment of a nonresident fiduciary who has a substantial beneficial interest in the litigation is immune from challenge on jurisdictional grounds. *Hackney* does not answer the question presented here. In that case, a personal representative's duties under the Oklahoma wrongful death statute were found to be more than nominal. In contrast, in this case Wilsey, as personal representative, would be merely a nominal party under *Betar*.

She has a stake in the outcome (*i.e.*, is a real party in interest) *solely* by virtue of her status as a beneficiary. But this stake is no different from that held by the two remaining beneficiaries,

one of whom is an Illinois resident. We think that the exception Wilsey asks us to create cannot withstand scrutiny. Where the personal representative's role under state law is that of a nominal party, the citizenship of the beneficiaries controls. Merely because one of these beneficiaries seeks appointment as the personal representative does not dispense with consideration of the citizenship of the other beneficiaries. Complete diversity between the beneficiaries and the defendants is required.[5]

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Seventh Circuit

5. Our holding does not conflict with cases in which a nonresident beneficiary was named as personal representative and allowed to bring the wrongful death action in federal court. *See O'Brien v. Stover*, 443 F.2d 1013 (8th Cir. 1971); *Janzen v. Goos*, 302 F.2d 421 (8th Cir. 1962). In *O'Brien*, the nonresident fiduciary was the decedent's "sole heir." Diversity of citizenship was bona fide. In *Janzen*, the citizenship of all beneficiaries was the same as that of the nonresident surviving spouse who was appointed as personal representative.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
Argued February 21, 1985
April 17, 1985

Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge*

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,
Plaintiff-Appellant, Cross-Appellee,

vs.

Nos. 84-2178, 84-2237, 84-2258

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 84 C 1057
Michael M. Mihm, *Judge.*

*The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

O R D E R

In this case, we are asked to determine whether an Iowa resident may be appointed special administrator under the Illinois Wrongful Death Act, Ill. Rev. Stat. ch .70, § 2 (1983). Plaintiff Krista Wilsey, a resident and citizen of Iowa, is the mother of the decedent. Decedent was four years old and an Illinois resident at the time of her death, which allegedly resulted from negligence on the part of defendant doctors, residents of Illinois. Alleging jurisdiction under 28 U.S.C. § 1332(a)(1), Wilsey simultaneously filed two pleadings with the federal district court: a petition to have herself named as special administrator of the estate of her deceased daughter for the sole purpose of bringing a wrongful death action; and a complaint as special administrator charging defendant doctors with malpractice. Defendants responded with a motion to dismiss, arguing that a nonresident may not be appointed special administrator under the Act.

The district court apparently assumed jurisdiction under 28 U.S.C. § 1332(a)(1) on the basis of diversity of citizenship between Wilsey and the defendants, agreed with defendants that only an Illinois resident may be appointed a special administrator under the Act, denied the petition to be appointed special administrator, and dismissed the complaint for lack of jurisdiction. The first and only issue we address is the district court's jurisdiction.

The question raised is whether the district court correctly found that the uncontested diversity of citizenship between Wilsey and defendant doctors was sufficient to permit it to rule on the petition to be appointed special administrator. We think not. Wilsey contends, correctly we believe, that the district court would have had no authority to appoint a special administrator if a complaint had not been filed. Although appointment as special administrator is a prerequisite to the wrongful death action, the petition is ancillary to the complaint, the filing

of which commenced the action. Fed. R. Civ. P. 3. Upon the filing of the complaint, the district court was asked to assert its jurisdiction, if any, to entertain the wrongful death action. In testing whether jurisdiction existed, the court was required to look beyond the citizenship of the personal representative who sought to bring the action in her name.

As a general rule, the citizenship of the real party in interest is determinative in testing diversity jurisdiction. Although Rule 17(a) of the Federal Rules of Civil Procedure defines a personal representative as the real party in interest in the sense that the action may be maintained in his name alone, the rule is procedural and may not be used to extend or limit the subject matter jurisdiction of the district court.

In *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30 (7th Cir. 1979), this court held that the real parties in interest in a suit under the Illinois Wrongful Death Act are the statutory beneficiaries. It is their citizenship, not the citizenship of the personal representative, that is controlling. Diversity of citizenship between the beneficiaries and the defendants must be complete.

In this case, Wilsey's petition to be appointed special administrator makes clear that the statutory beneficiaries are herself, decedent's brother, and decedent's father. The petition further states that Wilsey is a resident of Iowa; decedent's brother is a resident of Iowa; and decedent's father is a resident of Illinois. Residence, however, is not synonymous with domicile or citizenship. For one to be deemed a citizen of a particular state, one must be physically present there and intend to remain there indefinitely. Although Wilsey's complaint alleges that she is a citizen of Iowa, the complaint contains no allegations concerning the citizenship of the other two statutory beneficiaries. She thus has failed to meet her burden of alleging and establishing jurisdiction. Although it appears doubtful that complete diversity of citizenship exists between defendants and the statutory

beneficiaries,[1] we believe it appropriate to remand this case to the district court for this jurisdictional determination as soon as may be reasonably possible.

We further believe it appropriate to retain jurisdiction of this appeal for the purpose of addressing the merits if the district court should determine that complete diversity of citizenship exists. The district court is to promptly inform this court of the result of its inquiry and appropriate steps will then be taken to dispose of this appeal.

SO ORDERED.

1. Decedent's father, alleged to be a resident of Illinois, probably cannot satisfy the physical presence requirement necessary to establish citizenship in a state other than Illinois.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

KRISTA WILSEY, individually and as special administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,

Plaintiff,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D.O., and VASANT F. PAWAR, M.D.,

Defendants.

No. 84-1057

ORDER

This is an action for wrongful death (Ill.Rev.Stat., ch. 70, §1 et seq) brought against three physicians for their alleged negligence in performing surgery on the decedent. Krista Wilsey, the decedent's mother, has petitioned this Court to appoint her as special administrator pursuant to §2.1 of the Wrongful Death Act so that she may prosecute this action. Ms. Wilsey is a citizen of Iowa and each of the Defendants is a citizen of Illinois, thus federal jurisdiction is premised upon diversity (28 U.S.C. §1332).

Defendants have sought to dismiss the action arguing that (1) this Court does not have the power to appoint a special administrator; and (2) Ms. Wilsey may not be appointed special administrator and thus this Court lacks jurisdiction. While Defendants have asserted other grounds for dismissal, the Court's resolution of these three grounds is dispositive.

Under §2.1 of the Illinois Wrongful Death Act (Ill.Rev.Stat., ch. 70, §2.1), the Court may appoint a special administrator for the deceased party to prosecute the wrongful death action. The Defendants argue that federal courts have no jurisdiction in "purely probate matters", *Rice v. Rice Foundation*, 610 F.2d 471 (7th Cir. 1979), and that this appointment is a probate matter.

However, the courts have construed the term probate very narrowly, *Rice*, 610 F.2d at 475, and will generally refrain from exercising jurisdiction only where it would interfere with probate proceedings or assume general jurisdiction of the probate. *Moore v. Lindsay*, 662 F.2d 354 (5th Cir. 1980); *Rice*, supra.

The Court does not believe that appointment of a special administrator for a wrongful death action would interfere with the probate proceeding or constitute an assumption of general jurisdiction over probate. Accordingly, the Court finds that it does have the power to appoint a special administrator in a wrongful death action.

The second issue to be addressed is whether Ms. Wilsey, as an Iowa resident, may be appointed special administrator. The Defendants argue that because the Wrongful Death Act does not provide any criteria for selection of a special administrator, reference must be made to the Probate Act, which requires that an administrator be a resident of Illinois. (Ill.Rev.Stat., ch. 110½, par. 9-1). The mere fact that the Wrongful Death Act sets forth no requirements for a special administrator does not require the Court to apply conditions found in other statutes.

However, the Court believes that, because of the relationship and reference to the Probate Act in the Wrongful Death Act, the necessity for an in-state administrator is present. Section 2.1 provides:

> "If a judgment is entered or the action is settled in favor of the special administrator, he shall distribute the proceeds as provided by law, except that if proceeds in excess of

> $1,000 are distributable to a minor or incompetent, the Court shall allow disbursements and fees to a special administrator and his attorney and the balance shall be administered and distributed under the supervision of the probate division of the Court."

This provision requires that any award be distributed as "provided by law", and any amounts distributable to a minor must be so distributed under the "supervision of the probate division of the Court". In order for the distributions to be made in accordance with the law, the person making such distributions must be subject to the jurisdiction of the Illinois courts. This is especially true in a situation where, as here, a distribution to a minor is involved, and thus must be supervised by the probate division of the court. If the special administrator is not an in-state resident, the probate division may not be able to properly supervise the distribution of the proceeds.

Accordingly, the Court finds that, under the facts of this case, Ms. Wilsey, as an Iowa resident, may not be appointed special administrator in this case. Therefore, her petition to be appointed special administrator must be DENIED. Because there is no basis for jurisdiction, the complaint must be DISMISSED.

IT IS SO ORDERED.

ENTERED: May 11th, 1984.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

ILL.REV.STAT., ch. 70, §2.1

2.1 Special administrator — Actions — Distribution of proceeds

§3. In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs, legatees or devisees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action.

If a judgment is entered or the action is settled in favor of the special administrator, he or she shall distribute the proceeds as provided by law, except that if proceeds in excess of $1,000 are distributable to a minor or person under legal disability, the court shall allow disbursements and fees to the special administrator and his or her attorney and the balance shall be administered and distributed under the supervision of the probate division of the court if the circuit court has a probate division.

Amended by P.A. 83-706, §33, eff. Sept. 23, 1983.

§1359. Parties collusively joined or made.

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. 28 U.S.C. § 1359.

85-1814

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,
Petitioner,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD MCKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MCCONNELL, KENNEDY, QUINN & JOHNSTON, Chartered
MURVEL PRETORIUS, JR.
LAUREN K. MEACHUM
TROY L. DAUGHERTY
227 N. E. Jefferson Street
Peoria, Illinois 61602
(309) 674-1133
Attorneys for Edward McKenney, D.O.

HEYL, ROYSTER, VOELKER & ALLEN
DUNCAN B. COOPER, III
GARY D. NELSON
KAREN L. KENDALL
600 Jefferson Bank Building
Peoria, Illinois 61602
(309) 676-0400
Attorneys for Vasant F. Pawar, M.D.

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

ISSUES PRESENTED FOR REVIEW

1. Whether the Seventh Circuit properly ruled that the district court must consider the residence of each beneficiary of an action under the Illinois Wrongful Death Act in determining whether complete diversity of jurisdiction exists in such an action.

2. Whether a United States federal court sitting in Illinois may properly refuse to appoint a nonresident special administrator in a wrongful death action in which the deceased minor was an Illinois resident prior to and at the time of her death.

3. Whether the trial court erred in allowing the petitioner to file her notice of appeal to the U.S. Court of Appeals for the Seventh Circuit on July 11, 1984 from an order of the court entered on May 11, 1984.

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No.

IN THE

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KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,
Petitioner,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD MCKENNEY, D.O., and VASANT F. PAWAR, M.D.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Edward McKenney, D.O., and Vasant F. Pawar, M.D., respondents herein, oppose petitioner's prayer that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 16, 1985 and file this brief in support thereof pursuant to Title 28 U.S.C., Supreme Court Rules, Rule 22.

JURISDICTION

This Court is asked to exercise its discretion and review the decision rendered in the United States Court of Appeals, Seventh Circuit, reported at ____ F.2d ____ and reproduced in petitioner's appendix, by granting a writ of certiorari pursuant to 28 U.S.C. §1254(1).

APPLICABLE STATUTES

The texts of the applicable statutes are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Respondents agree that petitioner's statement of the case is essentially accurate. We do wish to offer clarification.

As noted in the April 17, 1985 opinion of the Seventh Circuit, Krista Wilsey, initiated this action under 28 U.S.C. §1332(a)(1), by filing two pleadings in the federal district court. In one pleading, she asked the district court to name her special administrator of the estate of her deceased child, Lacey Hammel. In the second pleading, she sought recovery against all defendants under the Illinois Wrongful Death Act in the capacity of special administrator of the estate of Lacey Hammel.

Respondents moved to dismiss challenging the jurisdiction of the district court. The respondents raised two points. First, respondents contended that the district court did not have jurisdiction over an Illinois probate matter and could not appoint an administrator of an Illinois estate. Secondly, respondents contended that the court could not appoint an Iowa resident as the special administrator of an Illinois estate. In this, respondents relied upon the Illinos Probate Act which requires that an administrator of an Illinois estate must be an Illinois resident.

Contrary to Ms. Wilsey's assertion, the district court did not name her special administrator of the estate of Lacey Hammel. In fact, the district court denied Wilsey's petition, finding that an Iowa resident may not be appointed special administrator under the Illinois Wrongful Death Act (appendix to petition, A-20). Therefore, since she has not been so appointed, Ms. Wilsey's claim that she is the special administrator is simply inaccurate. Quoting the trial court: "...The court finds that,

under the facts of this case, Ms. Wilsey, as an Iowa resident, may not be appointed special administrator in this case. Therefore her petition to be appointed special administrator must be DENIED." (appendix to petition, A-20) (emphasis in original)

Thereafter, Jeffrey R. Hammel, father of Lacey Hammel, secured appointment of himself as special administrator of the estate of the deceased child and filed a wrongful death action against these respondents.[1] Jeffrey Hammel filed his petition seeking appointment and his complaint in the State Court of Illinois, Hancock County.

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[1] The August 17, 1984 order of the circuit court appears in the appendix.

REASONS FOR DENYING A WRIT OF CERTIORARI

Summary of Argument

This Court should deny Krista Wilsey's petition for writ of certiorari. The seventh circuit's decision here is consistent with *Bear v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30 (7th Cir. 1979) and this Court's opinion in *Navarro Savings Association v. Lee*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). It is also consistent with the approach of the other federal circuits that have considered this problem.

Denial of the petition is warranted because Krista Wilsey is not the special administrator of the estate of Lacey Hammel and cannot be so named under Illinois law. Although she boldly asserts that she is the special administrator of her daughter's estate pursuant to the Illinois Wrongful Death Act[2], her petition for appointment was denied by the trial court and that decision was not disturbed by the Seventh Circuit (appendix to petition, A-20, A-8). Furthermore, she cannot be so appointed because the special administrator, under Illinois law, must be a resident of Illinois.

Finally, this Court should deny her petition on the basis that petitioner failed to timely file her notice of appeal to the U. S. Court of Appeals for the Seventh Circuit.

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[2] The text of the Illinois Wrongful Death Act, Ill.Rev.Stat., Ch. 70, §§2 and 2.1 is set forth in the appendix herein.

ARGUMENT

I. The U. S. Court Of Appeals For The Seventh Circuit Is In Accord With This Court And Its Sister Circuits In Its Application Of Federal Law On The Issue Of Whether The Beneficiaries Of A Wrongful Death Action Are The Real Parties In Interest For Purposes Of Diversity Jurisdiction.

Petitioner attempted to assert diversity jurisdiction through the appointment of a nonresident special administrator. Under Illinois law, it is procedurally correct to bring the action in the name of the special administrator. However, the substantive law of Illinois identifies the beneficiaries of the estate as the real parties in interest. It is undisputed that, for procedural purposes, the real party in interest under Federal Rule of Civil Procedure 17(a) is the personal representative of the deceased.

Article III, §2 of the United States Constitution and 28 U.S.C. §1332(a)(1) vests federal courts with jurisdiction over controversies between "citizens of different states." Although neither the statute[3] nor the constitution require all the parties on one side be citizens of the same state, the plaintiffs and the defendants must be diverse to one another. This rule of "complete diversity" was first recognized by Chief Justice Marshall in *Strawbridge v. Curtiss,* 3 Cranch 267, 2 L.Ed. 435 (1806).

In determining whether complete diversity exists, nominal or formal parties should be ignored and only real and substantial parties to the controversy should be considered. *Carneal v. Banks,* 10 Wheat. 181, 6 L.Ed. 297 (1825); *Salem Trust Company v. Manufacturers' Finance Company,* 264 U.S. 182, 44 S.Ct. 266, 68 L.Ed. 628 (1924); *Navarro Savings Association v. Lee,* 446 U.S. 458, 460, 64 L.Ed.2d 425, 429, 100 S.Ct. 1779 (1980). Thus, as recently stated by this court, "...a federal

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[3] 28 U.S.C. §1332(a)(1)

court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." *Navarro Savings Association v. Lee,* 446 U.S. 458, 460.

Consequently, the determination of real party in interest for procedural purposes and substantive purposes will not always yield the same result. Quoting this Court, "There is a rough symmetry between the real party in interest standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases." *Navarro Savings Association v. Lee,* 446 U.S. 458, 462, F.9. Rule 17(a) is procedural only and does not extend or limit the jurisdiction of the United States District Courts. See: Fed. Rule Civ. Proc. 82. Its only purpose is to identify the proper party in whose name an action is to be brought.

Under Illinois law the special administrator is a nominal party. The Illinois Wrongful Death Act does not give the special administrator the right to share in the recovery. The representative's *sole duty* under the Act is to prosecute the action and distribute the proceeds to the statutory beneficiaries in the event of recovery. See Ill.Rev.Stat., Ch. 70 §§2, 2.1; *Betar v. DeHavilland Aircraft of Canada, Ltd.,* 603 F.2d 30, 35 (7th Cir. 1979). (emphasis added).

As early as 1857 the Illinois Supreme Court recognized the very limited role of the personal representative under the Wrongful Death Act. The personal representative brings the action not for his or her own benefit, nor in the right of the estate. Rather, the representative is only the fiduciary for those who had a more or less direct pecuniary interest in the continuance of the life of the deceased. *City of Chicago v. Major,* 18 Ill. 349, 358 (Ill.S.Ct. 1857). "The history of the Illinois Wrongful Death Act demonstrates that although the action is to be brought by and in the name of the personal representatives of

such deceased person, the legislative intent is that those claims are those of the individual beneficiaries." *Wilbon v. D. F. Bast Company, Inc.*, 73 Ill.2d 58, 382 N.E.2d 784, 788 (1978).

Section 2 of the Illinois Wrongful Death Act does not create an individual right for a plaintiff bringing suit. Rather, it affords a cause of action for the statutory beneficiaries, who are the real parties in interest. Ill.Rev.Stat., Ch. 70, par. 2; See *Van Mehr v. Goldfarb,* 317 Ill. 620, 622, 148 N.E.2d 391 (Ill.S.Ct. 1925). Illinois courts have determined that a special administrator under the Wrongful Death Act is only a formal party having no interest whatsoever. He/she acts merely as the legal agent of the beneficiaries under the Act. *Voorhees v. Chicago & Alton Railway Company,* 208 Ill.App. 86 (3d Dist. 1917).

Although the special administrator brings the action in his or her name and controls the course of the proceedings, the statutory beneficiaries would still have the right to settle the action and release all claims against the defendants in a wrongful death action. As the special administrator is but the agent of the beneficiary, his control over the suit is not exclusive. See *Strong v. Hodges,* 344 Ill.App. 306, 100 N.E.2d 666 (2d Dist. 1951). It could therefore be inferred that in the event the special administrator was not diligent in his or her pursuit of the claim, the statutory beneficiaries could petition the court to have that special administrator removed and replaced by someone who would diligently protect their interests.

In light of this Illinois precedent, the Seventh Circuit correctly determined that the personal representative is but a nominal party to the lawsuit. (App. 8) See: *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35; *Matter of Field's Estate,* 588 S.W.2d 50 (Mo.App. 1979) (construing Illinois law). The representative's duty under the Act is to prosecute the action and distribute the proceeds to the statutory beneficiaries in the event of recovery. *Betar v. DeHavilland Aircraft of Canada,*

Ltd., 603 F.2d 30, 35. The special administrator lacks a "stake in the outcome" and the statutory beneficiaries are the only real parties in interest for purposes of diversity; "they are the only parties that have an actual stake in the outcome of the litigation." (appendix to petition, A-10).

Because this Court's ruling in *Navarro Savings Association v. Lee*, 446 U.S. 458, determined that the trustee in that case was a real party to the controversy, the petitioner asserts that it is contrary to the Seventh Circuit's pronouncement in this case and in *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30. But in *Navarro*, the trustees, by reason of the declaration of trust, were given "exclusive authority over [the] property free from any power and control of the shareholders, to the same extent as if the trustees were the sole owners of the trust estate in their own right. . . ." 446 U.S. 458, 459. There, the respondents had the power to transact the business of the trust beneficiaries, execute documents, and sue and be sued in the name of the trust or in the names of the trustees of the trust, as well as, invest the funds of the trust, lend money from the trust, and initiate or compromise lawsuits relating to the trust's affairs, all to the exclusion of the trust beneficiaries. 446 U.S. 458, 459. Thus, their interests were deemed real and substantial and this was decisive in this court's determination.

In contrast to the business trustees in *Navarro*, the powers of the special administrator under the Illinois Wrongful Death Act are very narrow. The role of the special administrator is limited to a single function. The special administrator is appointed pursuant to statute for the sole purpose of initiating a wrongful death action and distributing any procceds to the statutory beneficiaries that may be recovered from that litigation. Ill.Rev.Stat., Ch. 70, §2.1. Of course, the personal representative has a fiduciary duty requiring a bond to insure with diligence and fidelity. Performance of this fiduciary duty of diligence is hardly a sufficient stake in the action to make the representative the real party to the controversy. *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35.

Although the role of the special administrator in bringing a wrongful death action under Illinois law has been properly construed and applied by the Seventh Circuit, petitioner insists that the Seventh Circuit ruling is in conflict with its sister circuits. Petitioner points to various authorities which purport to support her position.[4] In this, petitioner is incorrect.

From a reading of the decisions cited by petitioner, it is apparent that no conflict exists. It is only the results of litigation that differ due to the facts and widely varying circumstances of each case.

Petitioner's attempt to manufacture a conflict among the circuits is unsuccessful. First, all of the cases she cites in her petition address the question of whether a particular administrator or trustee was improperly or collusively appointed for the purpose of creating diversity, in violation of 28 U.S.C. §1359. *Janzen v. Gooz,* 302 F.2d 421 (8th Cir. 1962); *McSparran v. Weist,* 402 F.2d 867 (3d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed.2d 217 (1969); *Bianca v. Parke-Davis Pharmaceutical Division,* 723 F.2d 392 (5th Cir. 1984); *Groh v. Brooks,* 421 F.2d 589 (3d Cir. 1970); *Gross v. Hougland,* 712 F.2d 1034 (6th Cir. 1983). Without question, "a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named." *McSparran v. Weist,* 402 F.2d 867, 873 (3d Cir. 1968; see also *Navarro Savings Association v. Lee,* 446 U.S. 458. As Ms. Wilsey has never been appointed special administrator that question is not properly at issue in this case.

Petitioner persists that this Court should hear this case in order to resolve a purported conflict between the Seventh Circuit's ruling in *Betar v. DeHavilland Aircraft of Canada, Ltd.* and the other circuits. However, petitioner's position is flawed

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[4] See petitioner's petition for writ of certiorari, p. 5, Ft. 3.

when the distinguishing facts in many of her cited cases are reviewed. The principles established in the Eighth, Third, Fifth and Sixth Circuits and with this Court in *Navarro Savings Association,* 446 U.S. 458, are embodied in the Seventh Circuit's decisions in this case and *Betar.*

Petitioner relies on the Tenth Circuit decision in *Hackney v. Newman Memorial Hospital,* 621 F.2d 1069, 67 A.L.R.F. 456 (10th Cir. 1980), *cert. denied,* 449 U.S. 982 (1980). But unlike this case and the *Betar* decision, *Hackney* was construing the role of the special administrator as defined by the law in Oklahoma. "Under Oklahoma law, the administrator, to whom the cause of action belongs, has full authority to conduct the litigations; the beneficiaries have no right to settle, control or otherwise dispose of the action." (emphasis added) (Appendix to petitioner's brief, A-12) Moreover, Oklahoma law permits the special administrator under the Oklahoma Wrongful Death Act to be a nonresident fiduciary.

In Illinois, not only does the cause of action belong to the beneficiaries, but the special administrator must be a resident of Illinois. Additionally, in contrast to the Oklahoma construction of their wrongful death statute, Illinois deems the special administrator to be merely a nominal party as the discussion above has made clear.

As with *Hackney,* petitioner's additional authority is not persuasive on the point she asserts. In *O'Brien v. Stover,* 443 F.2d 1013 (8th Cir. 1971), the nonresident fiduciary was the "sole heir'. Consequently, diversity jurisdiction was appropriate.

In *Bettin v. Nelson,* 744 F.2d 53 (8th Cir. 1984), state law permitted the decedent's out of state parents to be appointed as special administrators. But Illinois requires the administrator to be an Illinois resident and here, the only special administrator to have been appointed is the decedent's father, an Illinois resident. In spite of her selfproclaimed status, Krista Wilsey has never been appointed nor recognized by a court of law as the special administrator of the decedent.

In *Gross v. Hougland,* 712 F.2d 1034 (6th Cir. 1983), a receiver was appointed under Del.Ch.R. 150 to bring an action on behalf of a dissolved corporation against the majority shareholders for negligence in liquidating the corporate assets. The receiver, a Delaware citizen, alleged diversity of citizenship on the basis that he was diverse to the named defendants, citizens of Kentucky. The defendants objected, but the court of appeals ruled that diversity of citizenship was bona fide because under Delaware law the receiver had to be a citizen of that state and was designated as the real party in interest. In Illinois the special administrator must be an Illinois resident, which Krista Wilsey is not, and he/she is deemed to be only a nominal party to the litigation.

In *Field v. Volkswagenwerk, A.G.,* 626 F.2d 293 (3d Cir. 1980), under New York law the only person who could be named was Ivana Field, the decedent's husband. Ivana was a citizen of Czechoslovakia and the defendant was a citizen of West Germany. The court there refused access to the federal courts since jurisdiction over suits between aliens has been consistently denied. 626 F.2d at 296, citing 13 *C. Wright, A. Miller & Cooper,* Federal Practice and Procedure, Section 3604, at 607-08 (1975) and cases cited thereunder.

Thus, the federal circuit courts are consistent among themselves and with this Court's decision in *Navarro Savings v. Lee,* 446 U.S. 458. Moreover, the Seventh Circuit is properly construing and applying the law of Illinois as it pertains to the status of the special administrator under the Illinois Wrongful Death Act, concluding that the special administrator is but a nominal or formal party to the lawsuit and the real and substantial parties to the controversy are the statutory beneficiaries.

Finally, the ruling of the Seventh Circuit in *Betar* and this case provides a clear test which is easy to apply and assures that cases which are wholly local in nature remain in the Illinois state courts. If allowed, petitioner's position would open the flood

gates to the federal courts. It would permit any action under the Illinois Wrongful Death Act to be brought in a U. S. district court simply by naming an out of state administrator.

II. A Federal District Court Sitting In Illinois May Properly Refuse To Appoint A Non-Resident Administrator In A Wrongful Death Action In Which The Deceased Minor Was An Illinois Resident Prior To And At The Time Of Her Death.

Even if this Court determined that a special administrator under the Illinois Wrongful Death Act was a real party to the controversy for purposes of determining diversity of citizenship, this Court should deny petitioner's petition for writ of certiorari on the basis that the district court properly refused to appoint petitioner herein, as a non-resident administrator in a wrongful death action in which the deceased minor was an Illinois resident prior to and at the time of her death. Without appointment of petitioner, an out of state resident, there is no diversity.

In its denial of petitioner's petition to be appointed special administrator, the court reasoned that, "because of the relationship and reference to the Probate Act in the Wrongful Death Act, the necessity for an in-state administrator is present." (Appendix to petitioner's brief, A-19) Additionally, the court indicated a concern that distribution to a minor, as is involved here, could not be properly supervised by the probate division of the court if the special administrator were not a resident of Illinois. (Appendix to petition, A-20).

In her brief to the Seventh Circuit, petitioner advocated the position that there are no requirements whatsoever which must be met prior to the appointment of a special administrator. The application of common sense, however, suggests a different result. If this Court were to accept the position which the peti-

tioner advocates, it would mean that a minor, an incompetent, or a resident of a foreign country could properly be appointed a special administrator under §2.1 of the Wrongful Death Act. Clearly, this cannot be an intended or a desired result. If the Wrongful Death Act and Probate Act are read together such nonsensical results are avoided.

Under the Probate Act an administrator must be at least 18 years of age, a resident of Illinois, of sound mind, not adjudged a disabled person, and not convicted of an infamous crime (Ill.Rev.Stat., Ch. 110½, par. 9-1).

Illinois case law supports the conclusion that the statutes must be read together. In *In Re Estate of Faught,* 111 Ill.App.3d 1043, 1045, 445 N.E.2d 54 (1983), a conflict had arisen between an administrator to collect or special administrator appointed under the Wrongful Death Act and an executor appointed subsequent to the special administrator. Section 2.1 of the Wrongful Death Act was silent as to the resolution of this conflict. The appellate court held that even though the special administrator had been properly appointed under the Wrongful Death Act the appointment of the executor under the Probate Code properly resulted in the revocation of the appointment of the special administrator. In reaching its decision, the court noted that nothing in §2.1 of the Wrongful Death Act serves to abrogate the provisions of the Probate Act.

Faught merely recognizes the inherent relationship between the Wrongful Death Act and the Probate Act. Moreover, based on the particular facts in the instant case, Judge Mihm expressed understandable concern that the person appointed special administrator be subject to the jurisdiction of the Illinois courts where, as here, the proceeds could be distributable to a minor.

The obvious purpose of §2.1, which was added to the Wrongful Death Act effective October 1, 1977, is to facilitate the filing of a wrongful death action by a special administrator in a case where the only asset of the deceased's estate is a cause

of action arising under the Act by obviating the requirement of opening an estate. However, the defendants would not agree with petitioner that the elimination of the requirement of opening an estate necessitates that §2.1 was intended to do away with all requirements as to the appointment of a special administrator. The mere application of minimum requirements to the appointment of a special administrator in no way reduces the ease with which a wrongful death action may be initiated. Rather, the application of minimum requirements merely insures that the person appointed is competent to serve as administrator thus facilitating the distribution of the proceeds at the conclusion of the action.

It is more reasonable and logical to assume that, consistent with other statutory references to the Probate Act found in the Wrongful Death Act, the legislature intended that the mental, moral, age and residency requirements apply to the appointment of a special administrator.

Because both common sense and Illinois case law support the decision of the trial court, the trial court's ruling that a federal district court sitting in Illinois may properly refuse to appoint a non-resident administrator in wrongful death action where the deceased minor was an Illinois resident prior to and at the time of death was proper.

III. Failure To File Within The Time Prescriptions Precludes Pursuit Of An Appeal.

Rule 4(a)(1) of the Rules of Appellate Procedure states that the notice of appeal "*shall* be filed with the clerk of the District Court within 30 days after the date of entry of judgment or order appealed therefrom." (emphasis added) This 30 day time limit is mandatory and jurisdictional. *Browder v. Director, Illinois Department of Corrections,* 434 U.S. 257, 54 L.Ed.2d 521, 98 S.Ct. 556 (1978); *Selph v. Council of the City of Los Angeles,* 593 F.2d 882 (9th Cir. 1979). Consequently, where a

party fails to file a timely notice of appeal, the appellate court has no jurisdiction over the case. *Sooner Products Company v. McBride,* 708 F.2d 510 (10th Cir. 1983); *Gooch v. Skelly Oil Company,* 493 F.2d 366 (10th Cir. 1974).

Two narrow exceptions to the requirement of timely notice have been incorporated into the rule. In order to file a notice of appeal after the expiration of the 30 day time period, the party requesting the extension must show excusable neglect or good cause for failure to file in a timely fashion. Federal Rule of Appellate Procedure 4(a)(5).

The good cause exception is clearly inapplicable to the present situation. That exception merely codified preexisting case law allowing an extension of time under circumstances where the term "excusable neglect" was a misnomer. This exception applies only to requests for extension of time where the 30 day time limit has not expired. *State of Oregon v. Champion International Corporation,* 680 F.2d 1300 (9th Cir. 1982). Since petitioner's request was filed more than 30 days after the entry of the order, the only available exception is excusable neglect.

The standard for determining excusable neglect is a strict one. *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Company,* 539 F.2d 1109 (7th Cir. 1976); *Selph v. Council of the City of Los Angeles,* 593 F.2d 882; *State of Oregon v. Champion International Corporation,* 680 F.2d 1300. The burden rests on the party requesting the extension to make a clear showing that the circumstances of the case are unique or extraordinary and the neglect was excusable. *Birl v. Estelle,* 660 F.2d 592 (5th Cir. 1981); *Fase v. Seafarers Welfare & Pension Plan,* 574 F.2d 72 (2d Cir. 1978); *Spound v. Mohasco Industries, Inc.,* 534 F.2d 404 (1st Dir. 1976).

The historical development of Rule 4(a) clearly indicates that strict adherences to the time limit is intended and enforcement of those time limits may be relaxed only under the most exceptional circumstances.

The intention that the excusable neglect exception continue to be strictly construed is likewise evidenced by the committee note to the 1966 amendment where it states:

> "*In view of the ease with which an appeal may be perfected,* no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in *extraordinary cases* where injustice would otherwise result. (emphasis added). *Files v. City of Rockford,* 440 F.2d 811, 814 (7th Cir. 1971).

The courts have strictly adhered to the stringent standard of excusable neglect. It has been held that the excusable neglect standard is not met by claims of confusion, mistake of law or misunderstanding by counsel. *In Re Buckingham Supermarkets, Inc.*, 631 F.2d 763, 766 (D.C. Cir. 1980). Likewise, inadvertence or mere palpable mistake by counsel fails to rise to the level of excusable neglect. *Chipser v. Kohlmeyer & Company,* 600 F.2d 1061, 1063 (5th Cir. 1979); *Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 411 (1st Cir. 1976).

In the Seventh Circuit, petitioner made an equivocal argument that mistake or misconception of the law applies to this case. On one hand she cited *Feeder Line Tow Service v. Toledo,* 539 F.2d 1107 (7th Cir. 1976) for the proposition that legal misconception may amount to excusable neglect. In *Feeder,* the misconception was occasioned by two directly conflicting statutes. In addition to the factual disparity between *Feeder Line* and the present case, petitioner's counsel has never admitted that in fact she misperceived the applicable law on the statute of limitations. In her factual summary, she clearly stated that only a "strained" interpretation of Judge Mihm's order could interfere with her state action. The trial court in Hancock County has, in turn, acceded to petitioner's argument.

Regardless, petitioner's actions are clearly outside the sphere of excusable neglect. Her decision to abandon her federal court appeal and proceed in the state court was a tactical decision. Petitioner renewed her pursuit of the federal action when she was dissatisfied with the progress of the state court action. A tactical decision is not tantamount to excusable neglect. *Linabary v. Maritime Overseas Corporation,* 376 F.Supp. 688 (S.D.N.Y. 1977).

On May 11, 1984, petitioner's attorney knew that a final and appealable order had been entered, and that the time for appeal was running. On June 14, 1984, her state court action was attacked by defendant's motion to dismiss. Therefore, she filed a motion for extension of time to appeal. Petitioner cannot now change her tactics and pursue her federal action, in conjunction with her state action, under the guise of excusable neglect. In her brief, petitioner stated that her "original desire" was to refile the action in state court rather than to appeal the federal court decision "to avoid delay and expense". (Brief in the Seventh Circuit of plaintiff-appellant, cross-appellee p. 7) Further evidence that petitioner's decision was tactical, is the fact that her counsel could have filed a notice of appeal and, if subsequently it was ascertained that any appeal should not be pursued, the appeal could have been dismissed. However, she chose to forego her appeal.

Petitioner portrays the standard of abuse of discretion as an impenetrable barrier. However, this standard has hardly been impervious to review. Consistently, the appellate courts have scrutinized the trial court's finding of excusable neglect. In many instances, the trial court's decision to extend the time limits has been overturned. E.g. *Sprout v. Farmers Insurance Exchange,* 681 F.2d 587 (9th Cir. 1982); *Pellingrino v. Marathon Bank,* 640 F.2d 696 (5th Cir. 1981); *Gooch v. Skelly Oil Company,* 493 F.2d 366 (10th Cir. 1974); *Files v. City of Rockford,* 440 F.2d 811 (7th Cir. 1971).

Where, as here, there is no excuse for the late filing of a notice of appeal, it is an abuse of discretion for a district court to grant an extension of time. *Sprout v. Farmers Insurance,* 681 F.2d at 588 (9th Cir. 1982).

The basic rationale for insistence upon timely filing is the necessity for providing a precisely ascertainable point of time at which litigation comes to an end. *Files v. The City of Rockford,* 440 F.2d 811 (7th Cir. 1971). It is imperative that the provisions of Rule 4(a) be enforced to assure finality of judgments and to maintain order in the judicial process. Federal Rule of Appellate Procedure 4(a) must be construed to protect this value. *Selph v. Council of the City of Los Angeles,* 593 F.2d 881, 882 (9th Cir. 1979).

The petitioner's late notice of appeal should be dismissed as untimely. Dissatisfaction with the status of a collateral proceeding has never constituted excusable neglect. Petitioner's efforts to change her tactics in asserting her claim clearly fail to meet the standard of excusable neglect. Under the circumstances, this Court should deny the issuance of a writ of certiorari in this cause.

CONCLUSION

From the foregoing analysis, it is clear that this Court should not issue a writ of certiorari in this case. The petitioner is not the special administrator of the decedent's estate and the district court properly concluded that she could not be so named under Illinois law. Moreover, Illinois law does not grant her the privilege of suing in her individual capacity. Even if she was the statutory representative of the deceased's estate, the Seventh Circuit properly identified her as but a nominal party to the litigation which precluded her citizenship from controlling for purposes of diversity. Absent complete diversity of citizenship, the district court properly ruled that the wrongful death action filed by Krista Wilsey should be dismissed and the controversy should be heard in its proper forum, the State of Illinois.

Further, the petitioner failed to file her notice of appeal within the applicable time limits. Since she failed to sustain her burden to show good cause or excusable neglect, no extension of time should be granted and her petition should be summarily denied.

Respectfully submitted,

McCONNELL, KENNEDY, QUINN
& JOHNSTON, Chartered
Murvel Pretorius, Jr.
Lauren K. Meachum
Troy L. Daugherty
227 N.E. Jefferson Street
Peoria, Illinois 61602
(309) 674-1133
Attorneys for Edward McKenney, D.O.

HEYL, ROYSTER, VOELKER
& ALLEN
Duncan B. Cooper, III
Gary D. Nelson
Karen L. Kendall
600 Jefferson Bank Building
Peoria, Illinois 61602
(309) 676-0400
Attorneys for Vasant F. Pawar, M.D.

APPENDIX

APPENDIX

70 Ill.Rev.Stat. §2

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.

"In every such action, the jury shall determine the amount of damages to be recovered without regard to and with no special instruction as to the dollar limits on recovery imposed by this Section. In no event shall the judgment entered uon such verdict exceed $20,000 where such death occurred prior to July 14, 1955, and not exceeding $25,000 where such death occurred on or after July 14, 1955 and prior to July 8, 1957, and not exceeding $30,000 where such death occurs on or after July 8, 1957 and prior to the effective date of this amendatory Act of 1967, and without limitation where such death occurs on or after the effective date of this amendatory Act of 1967.

"The amount recovered in any such action shall be distributed by the court in which the cause is heard or, in the case of an agreed settlement, by the circuit court, to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person.

"Where the deceased person left no surviving spouse or next of kin entitled to recovery, the damages shall, subject to the following limitations inure, to the exclusive benefit of the following persons, or any one or more of them:

(a) to the person or persons furnishing hospitalization or hospital services in connection with the last illness or injury of the deceased person, not exceeding $450;

(b) to the person or persons furnishing medical or surgical services in connection with such last illness or injury, not exceeding $450;

(c) to the personal representatives, as such, for the costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee. In any such case the measure of damages to be recovered shall be the total of the reasonable value of such hospitalization or hospital service, medical and surgical services, funeral expenses, and such costs and expenses of administration, including attorney fees, not exceeding the foregoing limitations for each class of such expenses and not exceeding $900 plus a reasonable attorney's fee.

"Every such action shall be commenced within 2 years after the death of such person but an action against a defendant arising from a crime committed by the defendant in whose name an escrow account was established under the 'Criminal Victims; Escrow Account Act' shall be commenced within 2 years after the establishment of such account. For the purposes of this Section 2, next of kin includes an adopting parent and an adopted child, and they shall be treated as a natural parent and a natural child, respectively. However, if a person entitled to recover benefits under this Act, is, at the time the cause of action accrued, within the age of 18 years, he or she may cause such action to be brought within 2 years after attainment of the age of 18.

"In any such action to recover damages where the wrongful act, neglect or default causing the death occurred on or after July 14, 1955, it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries on behalf of whom the action is brought, but the amount of damages given shall not include any compensation with reference to the pecuniary injuries resulting from such death, to such contributorily negligent person or persons, and such contributorily negligent person or persons shall not share in any amount recovered in such action."

70 Ill.Rev.Stat. §2.1

"In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs, legatees or devisees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action.

"If a judgment is entered or the action is settled in favor of the special administrator, he or she shall distribute the proceeds as provided by law, except that if proceeds in excess of $1,000 are distributable to a minor or person under legal disability, the court shall allow disbursements and fees to the special administrator and his or her attorney and the balance shall be administered and distributed under the supervision of the probate division of the court if the circuit court has a probate division."

110½ Ill.Rev.Stat. §9.1

"Who may act as administrator. A person who has attained the age of 18 years and is a resident of this State, is not

of unsound mind, is not an adjudged disabled person as defined in this Act and has not been convicted of a crime rendering him infamous is qualified to act as administrator."

110½ Ill.Rev.Stat. §22-3

"Right to sue. If no letters are issued in this State upon the estate of a nonresident decedent or ward, a representative to whom letters are issued on the estate by a court of competent jurisdiction of any other state, territory, country or the District of Columbia may sue in this State in any case in which a resident representative may sue. The court in which the suit is filed may order the nonresident representative to give bond for costs as in case of other nonresidents."

Fed.R.Civ.P. 4(a)(1)

"In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted."

Fed.R.Civ.P. 4(a)(5)

"The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the

expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

28 U.S.C. §1332(a)(1)

"Diversity of citizenship; amount in controversy; costs

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

28 U.S.C. §1359

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. June 25, 1948 c. 646, 62 Stat. 935

Fed.R.Civ.P. 17(a)

"Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit

of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest."

Fed.R.Civ.P. 82

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§1391-93."

1853 Illinois Laws 97

"The amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death." 1853 Illinois Laws 97; Ill.Rev.Stat. 1953, Ch. 70, par. 2.

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
CARTHAGE, HANCOCK COUNTY, ILLINOIS

No.

JEFFREY R. HAMMEL, as Special Administrator of the Estate of LACEY M. HAMMEL, deceased minor,

Plaintiff,

vs.

CHARLES F. EDDINGFIELD, M.D., EDWARD McKENNEY, D. O., and VASANT F. PAWAR, M.D.,

Defendants.

ORDER

THIS CAUSE coming on for hearing on behalf of the Petitioner, JEFFREY R. HAMMEL, it is hereby ordered that JEFFREY R. HAMMEL be appointed as a Special Administrator of the Estate of LACEY M. HAMMEL, pursuant to *Illinois Revised Statutes,* Chapter 70, Section 2.1

ENTERED: August 17, 1984

JUDGE: _____

Supreme Court, U.S.
FILED
MAR 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

KRISTA WILSEY, Individually and as Special Administrator of the Estate of LACEY M. HAMMEL, Deceased Minor,

Petitioner,

vs.

CHARLES F. EDDINGFIELD, M.D.; EDWARD MCKENNEY, D.O.; and VASANT F. PAWAR, M.D.,

Respondents.

BRIEF OF RESPONDENT, CHARLES F. EDDINGFIELD, M.D. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. CASSIDY, JR.
DAVID B. MUELLER
800 Lehmann Building
Peoria, Illinois 61602
(309) 676-0591

Attorneys for Respondent, Charles F. Eddingfield, M.D.

CASSIDY & MUELLER
Of Counsel

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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No. 85-1314

IN THE

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BRIEF OF RESPONDENT, CHARLES F. EDDINGFIELD, M.D. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner's STATEMENT OF THE CASE is essentially accurate except for the omission of certain procedural issues which support the decision below without regard to the questions presented. The following STATEMENT of Respondent, Eddingfield, presents those issues.

The deceased minor, Lacey Hammel was a resident of the State of Illinois, prior to and at the time of her death. Her mother, Krista Wilsey, an Iowa resident, filed a Complaint in the United States District Court for the Central District of Illinois and simultaneously petitioned that Court to name her as

special administrator of the decedent's estate for the purpose of bringing the action under Ill.Rev.Stat. ch. 70, §2.1 (1983). (A-22).[1] The dismissal of that Complaint is the subject of this review. Another statutory beneficiary, the father of the deceased minor, Jeffrey Hammel, an Illinois resident, thereafter filed an identical action in the state court pursuant to the same statute. (A-8-9).

Eddingfield has consistently maintained that under Illinois law[2] Wilsey, as a non-resident, cannot qualify as "administrator" for the purpose of maintaining the action. In this regard it has also been his contention that jurisdiction is lacking to consider an appointment which serves as a prerequisite to the creation of the diversity of citizenship required for the jurisdiction upon which the claim is based. The District Court agreed (A-8-9), and even Judges Posner, Eshbach and Easterbrook, while espousing a conflict among the circuits on other issues, recognized that the Plaintiff's capacity to sue would ultimately control the jurisdictional question (A-6-7).

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[1] All citations are to the Appendix which accompanies Wilsey's Petition for Certiorari.

[2] See Ill.Rev.Stat., ch. 110½, §9-1 (1983) which provides:

> "Who may act as administrator. A person who has attained the age of 18 years and is a *resident of this state,* is not of unsound mind, is not an adjudged disabled person as defined in this Act and has not been convicted of a crime rendering him infamous is qualified to act as administrator." (emphasis supplied).

REASONS FOR DENYING THE WRIT

Summary of Argument

The decision below is correct without reference to the questions presented by the Petitioner. As recognized by the district court and the courts of appeal, substantive jurisdictional questions remain even if the Petitioner technically qualifies as a proper party for diversity purposes. At the outset the district court must exercise probate jurisdiction for the purpose of creating diversity of citizenship. In this regard a non-resident cannot qualify under Illinois law as administrator and therefore the Petitioner's citizenship precludes the status essential for her to maintain the litigation. Recognition of these fundamental propositions is a prerequisite to any consideration of the question presented, and it is therefore neither necessary nor likely that this Court would reach the alleged "conflict".

I. The District Court Would Be Required To Exercise Non-Existent Probate Jurisdiction To Create The Diversity Jurisdiction Claimed.

This action was not commenced by a fiduciary previously appointed and acting in that capacity under state law. Rather, intervention of the district court was first sought to invest the Plaintiff with authority to sue and thereby to create a statutory claimant whose residence might then be considered for the purposes of diversity jurisdiction. The viability of this approach presupposes the invocation of an existent federal probate jurisdiction antedating the existence of a "controversy" between "citizens of different states".[3] Jurisdiction of this type is not vested in the federal courts.

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[3] 28 U.S.C. §1332 (1976).

The Judiciary Act of 1789 (ch. 20, §11, 1 Stat. 78) conferred on the federal courts, in diversity cases, concurrent jurisdiction over 'all suits of a civil nature at common law or in equity'. Its current counterpart, 28 U.S.C., §1332(a), vests jurisdiction in the federal courts over 'all civil actions'. However, the language employed was intended to be synonymous with that of its predecessor.[4] "Suits of a civil nature at common law or in equity"' related to matters cognizable in the common law or chancery courts of England. Probate matters were within the exclusive jurisdiction of the ecclesiastical courts and therefore were not included within the judiciary act's grant of jurisdiction. The federal courts have therefore refused to entertain matters which are strictly probate in nature and have expressed a general reluctance to act in instances which would interfere with pending probate proceedings.[5]

The exercise of probate jurisdiction under circumstances such as those here presented would also be inappropriate as no "civil action" was pending at the time appointment was sought.[6] In the limited context of "infants or incompetent persons" Rule 17[7] permits the Court to appoint a "guardian ad litem". Ap-

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[4] Reviser's Note to 28 U.S.C. §1332 (1976).

[5] *Markham v. Allen,* 326 U.S. 490, 494 (1946) wherein it is stated:

> "It is true that the federal court has no jurisdiction to probate a will or administer an estate,..." *Id.*

[6] As the claim is one which can be maintained only by a statutory representative, federal jurisdiction must inevitably await action by the state court having probate powers. Not only does the Wrongful Death Act require the sequential qualification of a fiduciary who may then bring the action, the determination of whether a particular putative plaintiff qualifies in that respect is beyond the purview of federal jurisdiction. For example, upon what basis might the District Court exercise jurisdiction to resolve conflicting claims for representative capacity between: (1) applicants from the same state, or (2) applicants from different states?

[7] Fed. R. Civ. P. 17(c).

pointments under that rule are for the purpose of facilitating, as opposed to investing the Court with jurisdiction. Thus, it is the substantive interests of the minor or incompetent, for whom appointment is sought which control for diversity purposes and not those of the guardian. *Morgan v. Potter,* 157 U.S. 195 (1895); 3A J. MOORE & J. LUCAS, *Moore's Federal Practice* §17.26 (2d ed. 1985). Were the rule otherwise then by its appointment the Court would either create or destroy the jurisdiction which it exercised.

This is consistent with the requirement that the party in whose name suit is brought for diversity purposes must have a preexisting substantive interest in the assets involved and therefore in the outcome. *Kramer v. Caribbean Mills,* 394 U.S. 823 (1969). As otherwise expressed, litigants cannot "manufacture jurisdiction by vesting the claim in a nominal party for that purpose.[8] Where the action is one which must be brought by a fiduciary then that representative's status must be determined by considerations other than the selection of a forum. *Navarro Savings Association v. Lee,* 446 U.S. 458 (1980). There the individual trustees of a Massachusetts business trust served in that capacity under Massachusetts law independent of litigation

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[8] *Kramer v. Caribbean Mills* involved an assignment of claims to create jurisdiction contrary to 28 U.S.C. §1359. In condemning the attempt the Court made the following distinction between the consensual assignment of a claim and the intervention of the state courts in instances where a personal representative is appointed:

> "Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discreet sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties....". *Kramer,* 394 U.S. at 828 n. 9.

which was subsequently brought in the Northern District of Texas. Of particular significance to the affirmance of diversity was the declaration of trust which "authorized the trustees to take legal title to trust assets, to invest those assets for the benefit of shareholders and to sue and be sued in their capacity as trustees".

In the instant case the Petitioner is confronted by an obvious dilemma. If she urges that the role of "special administrator" is nominal and therefore falls within the type of ancillary action contemplated by Rule 17 then her lack of substantive involvement in the subject matter of the litigation precludes jurisdiction. *Kramer,* 394 U.S. 823; *Navarro Savings Association,* 446 U.S. 458; *Morgan,* 157 U.S. 195. On the other hand, if a "special administrator" possesses the authority and control requisite for jurisdiction then appointment by a state court having probate powers is mandatory.[9] Each of these alternatives is mutually exclusive and each defeats jurisdiction. Each also involves a threshold question requiring resolution well in advance of the questions presented by the Petitioner.

II. The Non-Resident Fiduciary Tendered As Plaintiff In This Cause Cannot Qualify In That Capacity Under Illinois Law.

The district court properly found that the fiduciary representative contemplated by the Illinois Wrongful Death Act,[10] must be an Illinois resident. This determination was mandated by the clear equation between "special administrator" under the Wrongful Death Act and "administrator" as defined in the Illinois Probate Act. Specifically, Section 9-1 of the latter provides:

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[9] This is particularly true as a court having probate powers would thereafter be involved in protecting the interests of the decedent's heirs, among whom were Illinois residents.

[10] Ill.Rev.Stat. ch. 70, §2.1 (1983).

> "Who may act as administrator. A person who has attained the age of 18 years and is a *resident of this state,* is not of unsound mind, is not an adjudged disabled person as defined in this Act and has not been convicted of a crime rendering him infamous is qualified to act as administrator." (emphasis supplied).

The term "administrator", whether or not categorized as "special", contemplates a fiduciary whose statutory obligation is to act on behalf of a specified class of beneficiaries subject to the authority of a court having appropriate jurisdiction over the collection, maintenance and distribution of the *res* in question. Contrary to the argument of Wilsey, the State of Illinois has a manifest interest in the qualification of those who would serve in that capacity, particularly where, as here, the decedent was a resident of Illinois and beneficiaries of the administration include Illinois residents. *Lowrence v. Central Illinois Public Service Co.,* 161 F.Supp. 656 (E.D. Ill. 1958).

The similarity in application of the term "administrator" between the Wrongful Death and Probate Acts is nowhere better found than in the concluding clause of Section 2.1 of the former where the involvement of a minor as beneficiary requires "supervision of the probate division of the court if the circuit court has a probate division". If the legislature intended to abolish the constraints of regulated fiduciary responsibility by vesting the affairs of Illinois decedents, and their respective beneficiaries, in "administrators" beyond the reach of the Illinois courts the foregoing language would have no application. On the other hand, if the act contemplates the exercise of probate jurisdiction through the "circuit court" then the maintenance of this action in the federal courts, subject to the appointment of a subsequent fiduciary to "administer" and "distribute" any proceeds recovered, is nothing more than an exercise in duplicative forum shopping. *Bass v. Texas Power & Light Co.,* 432 F.2d 763 (5th Cir. 1970), *cert. denied,* 401 U.S.

975 (1971); *Rogers v. Bates,* 431 F.2d 16 (8th Cir. 1970); *O'Brien v. Avco Corp.,* 425 F.2d 1030 (2d Cir. 1969). As otherwise expressed by the court in *Betar v. DeHavilland Aircraft of Canada, Ltd.,* 603 F.2d 30 (7th Cir. 1979), *cert. denied,* 444 U.S. 1098 (1980) in reference to the foregoing decisions:

> "These decisions have applied Section 1359 to defeat diversity jurisdiction based on the appointment of representatives with *only nominal duties for the purpose of creating diversity of citizenship.*" *Id.,* 34. (emphasis supplied).

The rule of *Kramer v. Caribbean Mills* and *Navarro Savings Association v. Lee,* depends in large part upon the weight given state law in its recognition of the status of fiduciaries whose existence and qualification derives from substantive relationships apart from the maintenance of litigation. This is the same theme which pervades the authorities from other circuits relied upon by the plaintiff. *Bettin v. Nelson,* 744 F.2d 53 (8th Cir. 1984); *Bianca v. Parke-Davis Pharmaceuticals Division,* 723 F.2d 392 (5th Cir. 1984); *Hackney v. Newman Memorial Hospital,* 621 F.2d 1069, 68 ALRF 456 (10th Cir. 1980), *cert. denied,* 449 U.S. 982 (1980); *Gross v. Hougland,* 712 F.2d 1034 (6th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1983); *Field v. Volkswagon, A.G.,* 626 F.2d 293 (3rd Cir. 1980). In every instance deference was accorded state law recognition of the qualification and role played by the personal representative in question. Here the plaintiff self proclaims her fiduciary status without the imprimatur of state law, and under circumstances where she could not qualify if sanction had been sought. It is therefore respectfully submitted that recognition of federal jurisdiction in this case would be rest upon the impermissible fabrication of a non-qualifying fiduciary in derogation of Illinois law.

CONCLUSION

Before the Petitioner's domicile, as opposed to that of the decedent's heirs, may be considered for diversity purposes she must first be a qualified and duly appointed fiduciary. As the district court found, Illinois law would not permit Wilsey to serve in the capacity sought. Even assuming qualification her appointment would require the exercise of a non-existent federal probate jurisdiction. These are preliminary considerations the resolution of which effectively precludes review of the questions here presented.

Accordingly, the Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN E. CASSIDY, JR.
DAVID B. MUELLER
800 Lehmann Building
Peoria, Illinois 61602
(309) 676-0591

Attorneys for Respondent,
Charles F. Eddingfield, M.D.

SUPREME COURT OF THE UNITED STATES

KRISTA WILSEY, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF LACEY M. HAMMEL, DECEASED MINOR *v.* CHARLES F. EDDINGFIELD ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 85–1314. Decided April 21, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Petitioner Krista Wilsey, an Iowa resident, filed this wrongful death action in the United States District Court for the Central District of Illinois against the respondents, three Illinois physicians. Specifically, the petitioner alleged that the respondents had been negligent in performing surgery on her four-year-old daughter, the decedent. The petitioner also requested that she be appointed special administrator of the estate of her deceased daughter so that she could properly prosecute the action: Under Illinois law, a special administrator is appointed to administer a decedent's estate where the only asset of that estate is a cause of action for wrongful death. See Ill. Rev. Stat. ch. 70, § 2.1. Jurisdiction was allegedly based on diversity of citizenship under 28 U. S. C. § 1332.

A panel of the United States Court of Appeals for the Seventh Circuit, however, held that diversity jurisdiction was lacking and dismissed the action. 780 F. 2d 614 (CA7 1985). Relying on its earlier decision in *Estar* v. *DeHavilland Aircraft of Canada, Ltd.*, 603 F. 2d 30 (CA7 1979), the Court of Appeals concluded that a special administrator under Illinois law has no personal stake in the proceeds of a wrongful death action but merely distributes those proceeds to the statutory

beneficiaries. Consequently, the statutory beneficiaries and not the special administrator are the real parties in interest whose citizenship is determinative for diversity purposes. Because the decedent's father, one of the statutory beneficiaries, was an Illinois resident, there was incomplete diversity between the parties and diversity jurisdiction was lacking.

This holding, as the Court of Appeals itself recognized, is in conflict with the Tenth Circuit's decision in *Hackney* v. *Newman Memorial Hospital, Inc.*, 621 F. 2d 1069 (CA10 1980), in which that court found diversity jurisdiction to be proper in a very similar situation involving the Oklahoma wrongful death statute. See also, *e. g.*, *Bettin* v. *Nelson*, 744 F. 2d 53 (CA8 1984); *Bianca* v. *Parke-Davis Pharmaceutical Div.*, 723 F. 2d 392 (CA5 1984). Moreover, as Judge Posner pointed out in his dissent from the Court of Appeals' decision not to rehear this case *en banc*, under Illinois law the special administrator is a fiduciary of the estate's beneficiaries and has sole control over the litigation. See *Rodgers* v. *Consolidated Railroad Corp.*, 136 Ill. App. 3d 191, 193, 482 N. E. 2d 1080, 1082 (1985). Thus, the holding below is also in tension with this Court's decision in *Navarro Savings Assn.* v. *Lee*, 446 U. S. 458, 465 (1980), in which we held that business trustees—"active trustees whose control over the assets held in their names is real and substantial"—were real parties in interest for diversity purposes. See also *Mecom* v. *Fitzsimmons Co.*, 284 U. S. 183 (1931). In addition, defining diversity jurisdiction by the citizenship of the statutory beneficiaries, the approach taken by the Seventh Circuit panel, could make for a difficult and time-consuming determination in ascertaining diversity for jurisdictional purposes. See *Navarro*, *supra*, 446 U. S., at 464, n. 13.

Because of the conflict among the circuits and the tension between the Court of Appeals' holding and our decision in *Navarro*, I would grant certiorari.